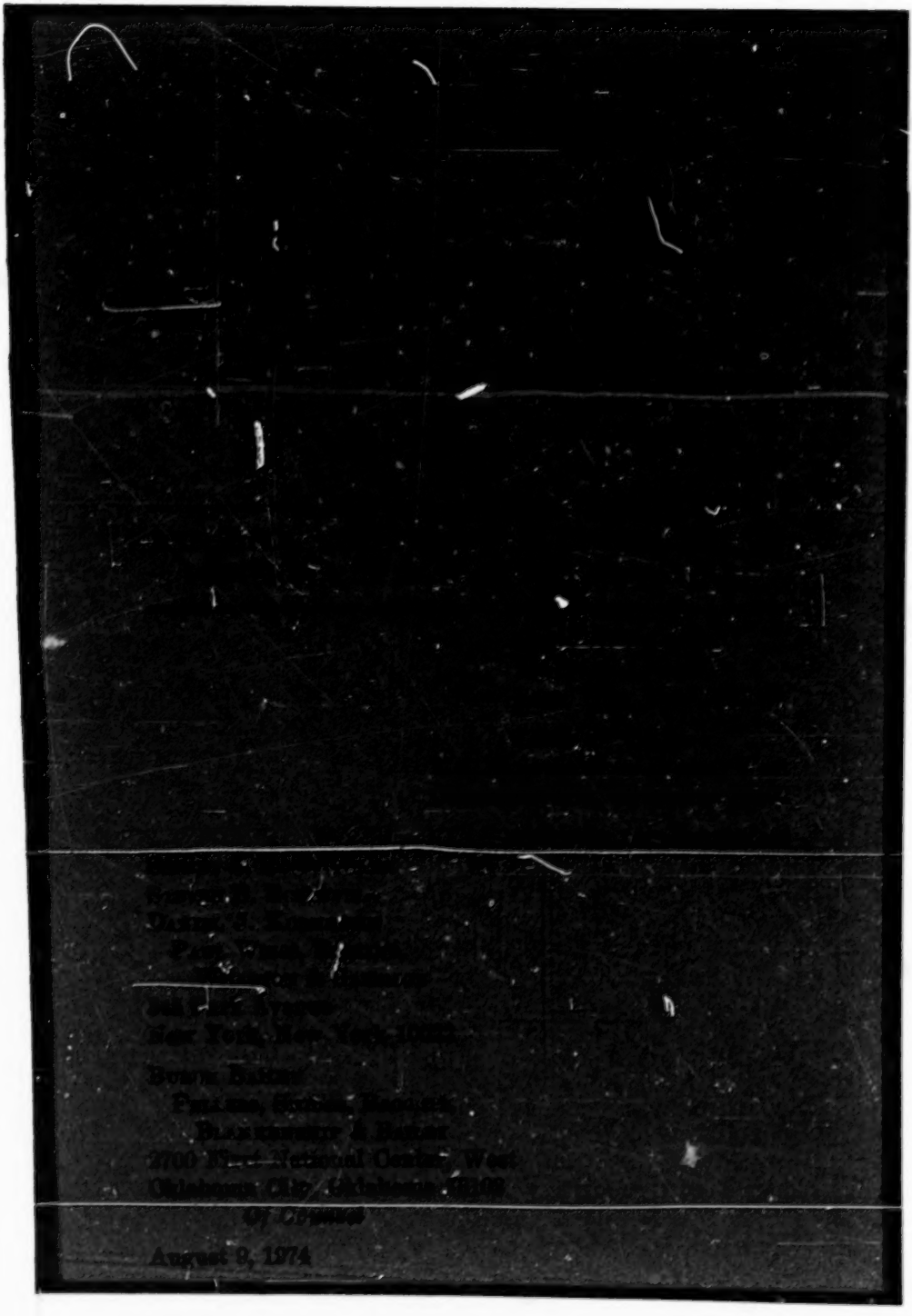

August 8, 1974

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-2006

COLORADO MAGNETICS, INC., d/b/a SOUND VALUES, INC., SOUND VALUES MARKETING CORP. and MAGNETIC RECORDERS CORP., RANDY SHERMAN and HARRY CUMMINGS, JR.,
Petitioners,

vs.

EDWARD B. MARKS MUSIC CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The findings of fact, conclusions of law and judgment of the District Court were reported at 357 F. Supp. 280, and are included in Appendices J and K of the Petition for Certiorari. The judgment and the two opinions of the United States Court of Appeals in the Tenth Circuit have not been officially reported. Copies are included in Appendix H to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the compulsory license provision of the Copyright Act, 17 U.S.C. §§ 1(e) and 101(e), applies to the copying of copyrighted musical compositions by means of unauthorized duplication of original sound recordings of such compositions, and thereby bars a claim of copyright infringement by an owner of the composition copyrights who has not consented to such use?

Statutes Involved

This case involves construction of Sections 1(e) and 101(e) of the Copyright Act, 17 U.S.C. §§ 1(e) and 101(e), printed in Appendices A and C of the Petition for Certiorari. Respondent does not agree that the other statutory provisions set forth in the Petition, 17 U.S.C. §§ 26 and 104, have any relevance to this case.

Statement of the Case

The Petition for Certiorari rests on a confusion between the distinct rights established by Congress in original musical compositions and those in sound recordings of performances of those compositions. As in *Goldstein* v. *California*, 412 U.S. 546 (1973), this case involves the activities of

"tape pirates" who duplicate without authority original sound recordings manufactured by others. But unlike *Goldstein*, which involved questions relating only to protection of the sound recordings themselves, this case involves questions pertaining only to the *composers' copyrights* in the underlying musical compositions, conferred by the Copyright Act of 1909. Specifically, it raises the question of whether Congress, in enacting the compulsory license provision of the 1909 Act, intended to sanction copying of musical compositions by means of tape piracy.

In this case, the Tenth Circuit, both initially and *en banc*, concluded that Congress had not intended to show such solicitude for pirates—and that any other intepretation would conflict with the purposes of the 1909 Act as well as the plain meaning of the statute. The Ninth Circuit previously reached the very same conclusion, and this Court denied certiorari. *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972).[1] The decisions here and in *Duchess* reflect the interpretation currently prevailing in all jurisdictions which have considered the question—except for a single federal district court decision now pending on appeal.[2] No new circumstances have been presented which would warrant review

1. The first "Question Presented" in the Petition for Certiorari in *Duchess* read as follows:

> "Whether duplicators come within the definition of 'any other person' and accordingly have a statutory right to use the Compulsory License provision of the Copyright Act (17 U.S.C. §1(e) conditioned upon compliance with its provisions and the payment of statutory royalties."

2. The only surviving contrary decision is that of the United States District Court for the District of New Jersey in *Jondora Music Publishing Co.* v. *Melody Recordings, Inc.*, 351 F. Supp. 572 (D.N.J. 1972); 362 F. Supp. 488, 494 (D.N.J. 1973). That decision

(footnote continued on next page)

of the issue which the Court previously declined to review in *Duchess*.

As set forth in the Petition, Magnetics[3] is engaged in the business of manufacturing and selling under its own labels unauthorized tape duplications of popular phonograph records manufactured by others; that is, not authorized either by the owner of the musical compositions or by the manufacturer of the record. Marks owns the copyrights in several of the musical compositions contained on the recordings copied and sold by Magnetics, including such well-known songs as "Malaguena" and "Wonderful! Wonderful!". Unlike licensed record manufacturers, Magnetics does not hire its own record producers, orchestrators, arrangers, musicians or performing artists, or bear any of the risks or costs of producing original sound recordings of Marks' compositions. Rather, it re-records on tape fully produced hit performances of those compositions by outstanding artists from commercially available records, without obtaining authority from anyone, and sells them to the public. It thus creates nothing new and incurs none of the costs of such creation.

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is currently on appeal to the United States Court of Appeals for the Third Circuit (No. 74-1241). All briefs have been filed, and the Court is expected to hear argument in September 1974.

As the Petition notes (Pet., p. 7), among the decisions which agree with that of the Tenth Circuit in the present case is *Fame Publishing Co.* v. *S & S Distributors, Inc.*, 363 F. Supp. 984 (N.D. Ala. 1973). Following that decision, the same court entered summary judgment for the same plaintiffs in a companion case, *Fame Publishing Co.* v. *Alabama Custom Tape, Inc.* (C.A. 72-507 N.W., N.D., Ala., Dec. 6, 1973). That judgment is now on appeal to the United States Court of Appeals for the Fifth Circuit (No. 74-1200). There, too, all briefs have been filed and oral argument is expected to be heard in September 1974.

3. For convenience, we adopt the designations of the parties utilized in the Petition for Certiorari: Petitioners will be collectively referred to as "Magnetics" and Respondent as "Marks".

As the sole basis for its claimed right to engage in what would otherwise be blatant infringement of Marks' copyrights, Magnetics has relied upon purported compliance with the "compulsory license provision" of the Copyright Act (17 U.S.C. §§ 1(e) and 101(e)). Under that provision, copyrighted musical compositions are protected against copying by means of mechanical recording, except that after the copyright holder or its licensee makes the first use of a composition on a recording, others are automatically entitled to "make similar use," upon compliance with procedures set forth in the statute. On Marks' suit to restrain Magnetics from infringing its copyrights, the Tenth Circuit followed the Ninth Circuit's *Duchess* decision, construing the phrase "similar use" to mean a use similar to that of the producer of the original recording, who creates a new work of art by the efforts of musicians, arrangers, performers and technicians and incurs the costs and risks inherent in recording original renditions of musical compositions. Both the Ninth and Tenth Circuits have therefore concluded that unauthorized duplicators such as Magnetics, who do none of these things, but merely purchase commercially available records and duplicate them, are not contributing to the store of art and not making "similar use" of the musical compositions—and hence are not entitled to the benefits of the compulsory license provision.

On the basis of that conclusion of law, the Tenth Circuit, initially and after rehearing *en banc*, reversed the contrary holding of the United States District Court for the Western District of Oklahoma, and remanded with instructions to enter judgment for Marks on the question of infringement.

ARGUMENT

I

The decision below is clearly correct and consistent with prior authority.

There can of course be no claim here of a conflict among the Circuits on the question presented, since both United States Courts of Appeals who have considered this question have ruled that the compulsory license provision is not applicable to unauthorized duplication of sound recordings.[4] The Tenth Circuit's decision is also consistent with the earliest constructions of the compulsory license provision, and represents the only interpretation which does not do violence to the plain meaning of the statutory language and the objectives which Congress sought to achieve when it enacted that provision in 1909.

Marks asserts only its rights as the owner of copyrights in the underlying musical compositions embodied on the

4. Magnetics is plainly in error when it suggests (Pet., p. 6) that "the present case is the first case decided by a Court of Appeals which clearly presents" the question. The Tenth Circuit expressly recognized that the Ninth Circuit had been "faced with this precise problem" in *Duchess Music Corp.* v. *Stern*, *supra* (Appx. H. to Petition, p. xx). Magnetics now contends (Pet., pp. 6-7, n. 6) that the Ninth Circuit did not squarely decide the issue, because in *Duchess*, one of the defendants attempted to comply with the compulsory license provision only *after* its infringing activity was detected. But that is a distinction without a whit of operative difference. It was only *because* the defendant Rosner made such a belated attempt to comply with the provision that the court in *Duchess* was called upon to decide whether the compulsory license provision was applicable. Contrary to Magnetics' suggestion, the Ninth Circuit dealt squarely with the very question presented here and decided it exactly as did the Tenth Circuit.

recordings pirated by Magnetics. It has no interest, nor does it assert any interest, in the sound recordings themselves. As the Tenth Circuit properly observed, "we are not here concerned, as such, with the record, and its copying, but with the original composition and the copyright interest therein." (Appx. H. to Petition, p. xxi.) However, as the Tenth Circuit further recognized (*Id.* p. xviii), the Copyright Act does afford Marks an exclusive right to determine who shall make use of its copyrighted compositions and in what manner. *Goldstein* v. *California, supra,* 412 U.S. at 563-64; *Standard Music Roll Co.* v. *F.A. Mills, Inc.,* 241 Fed. 360 (3rd Cir. 1917).

The compulsory license provision, upon which Magnetics relies, is a very limited exception to the copyright owner's exclusive right. It provides that, after the first authorized use of a copyrighted composition for the making of mechanical reproductions, others may make "similar use" of the composition by complying with the requirements of that provision. The provision would bar Marks' suit for infringement *only* if the specific use made of Marks' copyrights is a "similar use" which the provision was intended to cover.

Although the statute never expressly mentions piracy,[5] the words "make similar use" plainly show that the compulsory license provision is not available to pirates. The first license for recording of a musical composition is necessarily for an original recording of a live performance of

5. Indeed, the technology which gave rise to widespread tape piracy was unknown when the compulsory license provision was enacted in 1909. *See Goldstein* v. *California, supra,* 412 U.S. at 550 n. 23.

the musical work. The making of a taped duplicate of the original record differs significantly from such first use—and is not at all "similar" to the first use. Thus, the plain meaning of the compulsory license provision is, as the Tenth Circuit held, that one who complies therewith may then use

> "not a third party's record, but the copyrighted material, in a manner 'similar' to that employed by the recording company which did have authorization from the copyright owner. Magnetics may make its own arrangements, hire its own musicians and artists, and then record. It does not mean that Magnetics may use the composer's copyrighted work by duplicating and copying the record of a licensed recording company." (Appx. H, p. xix.)

This interpretation is also the only one which carries out the congressional intent. The compulsory license provision had two objectives—encouraging a multiplicity of different creative renditions of copyrighted music[6] and the prevention of monopoly. When these objectives are considered, as they were extensively in the briefs and arguments presented below, it is seen that, rather than furthering the objectives underlying the provision, protecting piracy under the shield of compulsory licensing would "devour the general policy" which the statute embodies. *Shilkret* v. *Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 (1943); *Spokane & Inland R.R.* v. *United States*, 241 U.S. 344, 350 (1916); see also *United States Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 664-65 (1973); *Clark* v. *Uebersee Finanz Korp.*,

6. As the court said in *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972), the compulsory license provision "promotes the arts by permitting numerous artistic interpretations of a single written composition."

332 U.S. 480, 489 (1947) (courts "should not impute to Congress a purpose to paralyze with one hand what it sought to promote with the other").

Rather than promoting "numerous artistic interpretations," granting copyright licenses to pirates would only encourage parasitic appropriation of the artistry of others and discourage legitimate record manufacturers from bearing the costs and risks of recording new artistic interpretations. *Fame Publishing Co., Inc.* v. *S & S Distributors, Inc.*, *supra*, 363 F. Supp. at 988; see also *Goldstein* v. *California*, *supra*, 412 U.S. at 546; *Capitol Records, Inc.* v. *Erickson*, 2 Cal. App. 3d 526, 538, 82 Cal. Rptr. 798, 805-06 (1969), *cert. denied*, 398 U.S. 960 (1970). Likewise, applying the compulsory license provision to piracy would not promote competition in the recording industry, but rather would allow pirates, who make no investment in the process of producing original recordings, to drive legitimate record companies—particularly the smaller ones—from the market place. See Testimony of Barbara Ringer, Assistant Register of Copyrights, *Hearing on S. 646 and H.R. 6927 Before Sub-No. 3 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. 20 (1971).[7]

7. Magnetics argues (Pet., pp. 9-10), that the Tenth Circuit decision will itself encourage monopoly, apparently because it ruled in favor of Marks, who uses a common agent with other publishers for the licensing of copyrights. To begin with, the unsupported charges of monopoly which Magnetics originally leveled against Marks and its agent were unanimously rejected by the entire *en banc* panel of the Tenth Circuit and Magnetics has, supposedly, abandoned such claims before this Court (Pet., p. 3). More important, the "great music monopoly" which Congress feared in 1909 had nothing to do with music publishers. Rather, Congress sought to avoid monopoly in the *recording industry* (*see* H.R. Rep. No. 2222, 60th Cong. 2nd Sess. at 33 (1909))—a result which is furthered, not avoided, by the destruction of smaller record companies at the hands of pirates.

There can thus be no serious dispute that the Tenth Circuit's construction of the statute is consistent with both of the stated objectives of Congress in 1909, and that a contrary conclusion would have subverted those goals. As Senior Judge Lynne said in *Fame Publishing Co., Inc.* v. *S & S Distributors, Inc., supra*, 363 F. Supp. at 988:

> "It is not lightly to be inferred that Congress, in carving out the compulsory license exception to the otherwise exclusive rights of the copyright proprietor, intended thereby to sanction the type of activity in which defendants engage."

Magnetics claims that the Tenth Circuit's decision is at odds with "accepted interpretation" of the Copyright Act (Pet., p. 10). In reality, the opposite is true. Not only is the Tenth Circuit's conclusion in harmony with the *Duchess* and *Fame* decisions, it also reflects the judicial construction given the statute soon after its enactment, *Aeolian Co.* v. *Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912); *Standard Music Roll Co.* v. *F.A. Mills, Inc.*, 241 Fed. 360 (2d Cir. 1917), as well as the decided weight of scholarly comment in the intervening half-century.[8]

Magnetics devotes a full section of its Petition (pp. 14-15) to presentation of the views of Professor Nimmer,

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8. *E.g.*, Bull, *Law of Copyright*, §212, pp. 462-63 (1944); Diamond *Copyright Problems of the Phonograph Record Industry*, 8 Bull. Cr. Soc. 227, 345 (1961); Comment, *Battle Over the Compulsory License: Mechanical Recording of Music*, 36 U. Colo. L. Rev. 501, 503 (1964); 2 Ladas, *The International Protection of Literary and Artistic Property*, §364, at 791 (1938); Howell, *The Copyright Law* (3d ed. 1952) at 150; Weil, *Copyright Law* (1917) at 421; Amdur, *Copyright Law and Practice*, §6, pp. 329-30 (1935); Dubin, *Copyright Aspects of Sound Recordings*, 26 So. Cal. L. Rev. 139, 141, n. 13 (1953).

Nimmer on Copyright, § 108.4621, pp. 432-33 (1973). Nimmer does indeed support Magnetics' position, but only after acknowledging that such an interpretation of the statute produces a "somewhat astounding result." (*Id.* at 420-21, 431-32.) However, as this Court has often stated, federal statutes should be construed and applied so as to avoid astounding or absurd consequences. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-43 (1940); *United States* v. *Katz*, 271 U.S. 354, 357 (1926); *United States* v. *Kirby*, 7 Wall. (74 U.S.) 482, 486-87 (1869). Surely, review by this Court is not needed to determine whether the Tenth Circuit correctly concluded that the statute did not compel such an "astounding result" as the one sought by Magnetics.

II

There is no conflict with *Goldstein*, either directly or in principle.

Magnetics asserts that the Tenth Circuit's decision "is in direct and total conflict" with this Court's decision last year in *Goldstein* v. *California*, *supra*. But nothing in *Goldstein* requires the conclusion that the compulsory license provision is available to pirates.

In *Goldstein*, this Court upheld the constitutionality of a state statute making record and tape piracy a crime. As the Court there made clear, it was considering an alleged conflict between federal and state law with respect to the protection of rights in "records, as *renderings of original*

artistic performance," 412 U.S. at 566 (emphasis by the Court). It concluded that the states were free to grant such protection because Congress had "indicated neither that it wishes to protect, nor free from protection, *recordings of musical performances* fixed prior to February 15, 1972" (412 U.S. at 571) and thus no "conflict between state law and federal law arises *in the case of recordings of musical performances*" (412 U.S. at 570) (emphasis added). Indeed, in analyzing the claims of conflict, this Court took care to point out that under the California statute involved "no limitation is placed on the use of the music, lyrics or arrangement employed in making the master recording" (412 U.S. at 550).

Thus, *Goldstein* would present an obstacle *only* if Marks, as erroneously supposed by Magnetics, were asserting a protected interest in the sound recordings themselves. But, as already noted, it is not a federal right in records or a prohibition against their duplication which Marks' asserts, but its own exclusive right to determine the use made of its copyrights in the musical compositions. Such an assertion creates no constitutional conflict between federal and state law—and *Goldstein* found none. There is thus no conceivable conflict between the Tenth Circuit's holding and that of *Goldstein*.[9]

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9. Magnetics correctly notes (Pet., pp. 6-7, n. 6) that the Tenth Circuit's holding is contrary to the assumption made, *arguendo*, in footnote 23 of the *Goldstein* opinion (412 U.S. at 546, n. 23). But that assumption was made solely for the purpose of refuting a contention by the tape pirates that the state criminal sanctions deprived composers of royalties Congress intended them to have. That assumption did not in any sense constitute acceptance of Magnetics' argument.

Nor is there any conflict with the rationale of *Goldstein*. Magnetics fabricates the "conflict" only by reading the Tenth Circuit's decision as ruling that Congress had "acted in the identical area found to be unattended in *Goldstein*" (Pet., p. 12). But this Court in *Goldstein* never held that duplication of sound recordings lay entirely in an "area" left "unattended" by Congress before 1971. Indeed, Magnetics cannot possibly so contend—for its entire argument rests on the contention that the compulsory license provision of the 1909 Act does in fact apply to its activities.

The "activity" engaged in by Magnetics—*i.e.*, the use of copyrighted compositions in the production of sound recordings—was clearly recognized in *Goldstein* as one which Congress had "attended" prior to 1971. This Court cited the House Report on the 1909 Act expressing Congress' intent "to give the composer or copyright proprietor the control * * * of the manufacture and use of" sound recordings (412 U.S. at 564). *Goldstein* also reviewed the legislative history of the 1909 Act to establish that musical compositions were in the category of protected "writings" and that sound recordings of these compositions constitute "copies" under that Act (412 U.S. at 566). Making such copies is clearly an activity affected by the Copyright Act, since it constitutes infringement if done without authority.

The question is not, therefore, whether Magnetics' activities have been touched or affected by acts of Congress; they clearly have been. The real issue is whether, in so acting to regulate the use of copyrighted music on sound recordings, Congress intended the kind of use made by defendants to come within the limited privilege afforded

by the compulsory license provision. The Tenth Circuit's recognition that it did not so intend conflicts not at all with the *Goldstein* definition of the area left "unattended" prior to 1972.

III

There is no conflict with the Sound Recording Amendment of 1971.

Magnetics' final argument (Pet., p. 12-14) is that the Tenth Circuit's decision conflicts with the recent amendment to the Copyright Law known as the "Sound Recording Amendment of 1971" (Public Law 92-140, 85 Stat. 391). But that amendment is no more dispositive of the present controversy than is the *Goldstein* decision, because it, too, was concerned solely with the creation of proprietary rights in sound recordings, not with the underlying compositions. That legislation for the first time gave *record manufacturers* rights and remedies against piracy, but did not affect the pre-existing rights of the owners of composition copyrights.[10]

It is therefore beside the point that the decisions of the Ninth and Tenth Circuits would permit coyprights owners to seek injunctions against unauthorized duplication of recordings of their copyrighted compositions, irrespective of whether the recordings involved are eligible for copyright protection under the new amendment. There is noth-

10. Section 2 of the 1971 bill did strengthen the *remedies* available to composition copyright owners for failure to pay royalties (see H. R. Rep. No. 92-487, 92nd Cong., 1st Sess., pp. 2, 7 (1971)), but that change did not in any sense affect the nature of the composition copyrights themselves, or the scope of the compulsory license provision.

ing anomalous about giving one person the power to prevent conduct which someone else, asserting different rights under a different statute, would be powerless to prevent.[11] Thus it follows that the copyright owner has the power to seek injunctions against unauthorized use of his copyright, which existed long before the 1971 legislation, and stems directly from the exclusive rights accorded to him under the 1909 statute. The subsequent creation of an additional proprietary interest in the sound recording itself, inuring to the record manufacturer, cannot possibly be made the basis for restricting the composers' and publishers' rights under the 1909 enactment. There is thus no support for Magnetics' bald contention (Pet., p. 14) that the decision below is "in direct conflict with the express language of the federal copyright statutes."[12]

Magnetics' statement (Pet., p. 13) that "the 1971 amendment was not considered" by the Tenth Circuit is belied simply by a reading of the decision below (Appx. H., pp. xx-xxii). The Tenth Circuit did indeed consider Magnetics' arguments based upon the 1971 amendment, espe-

11. Indeed, even under Magnetics' interpretation, a copyright owner would be free to enjoin the use of a composition on a pre-1972 pirated record where the compulsory license requirements were ignored—notwithstanding the fact that the record manufacturer had no power to prevent it himself.

12. The Petition makes cryptic references to the newly-drafted language in §26 of the Copyright Act (Appx. B to Petition), which is a general definitional provision. While that section, as amended, contains definitions of the terms "sound recordings" and "reproductions of sound recordings" and purports to be applicable to §§1(e) and 101(e), there is no indication in the statute or its legislative history that Congress intended thereby to affect in any way the rights of the owners of composition copyrights. It is a giant step, without any demonstrable support, to move from the new language in §26 to the proposition that the compulsory license provision was intended in 1909 to sanction piracy.

cially its reliance upon the portion of the House Judiciary Committee Report (H.R. Rep. No. 92-487, *supra*, *pp.* 2, 5) which appeared to support Magnetics' reading of the compulsory license provision (Pet., p. 13, n. 15). However, as this Court has frequently recognized, and as the Tenth Circuit held, views expressed in a committee report of one Congress, concerning construction of a statute adopted many years before by another Congress, have "very little, if any, significance" for the task of judicial interpretation. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). The Tenth Circuit thus quite properly held that "the 1971 amendment does not control the instant controversy."

In the final analysis, it is the intention of the 1909 Congress, as expressed in the plain meaning of the compulsory license provision and the legislative history underlying it, not the 1971 legislation creating new and different rights in sound recordings, which disposes of this controversy. As shown, the decisions of the Ninth and Tenth Circuits embodied the only reading of the statute which is in harmony with that intention.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: August 9, 1974

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